WORKPLACE SAFETY & INSURANCE BOARD

APPEAL SYSTEM

PRACTICE & PROCEDURES

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I. BACKGROUND

- Until October 1995, the Workplace Safety & Insurance Board's (WSIB) appeal system took an issue by issue approach to resolving objections. It also involved two separate levels of review and placed the responsibility for dealing with disputes entirely on its various appeal areas. These factors contributed to large appeal volumes, a great deal of double handling of claims and resulted in outcomes, which were often fragmented and incomplete. The system was marked by backlogs and delays at all levels.

- In October 1995, major changes were made to the appeal system. These changes took into account the interdependencies which exist in the entire adjudication system and reflected the need for the application of dispute resolution approaches at key points throughout the adjudication process. The changes also established greater accountability for the WSIB and its customers. The major changes included: dialogue by the frontline decision-maker; early file access for the dissatisfied party; the requirement that the party provide written reasons for the objection; reconsideration by the original decision-maker; and a single appeal review offering a variety of resolution methods aimed at achieving more complete outcomes.

- Effective January 1998, a further restructuring of the appeal system occurred and a single stream system was established. The previous system had been divided into two streams based on the type of issue under appeal (Mediation Stream for vocational rehabilitation and return to work issues/Entitlement Stream for all other issues). The new single stream system combined principles from both the old Mediation Stream and the old Entitlement Stream. Although the entry requirements and the methods of resolution remained consistent with the old Entitlement Stream, the resolutions themselves could include consensual agreements similar to old Mediation Stream outcomes. A single position of Appeals Resolution Officer (ARO) was created to replace the positions of Mediator, Reinstatement Officer and Appeals Officer which existed under the old system.

- The reasons for the restructuring included the legislative changes which removed mandatory mediation functions from appeals and placed them in the front lines of Operations. As well, the changes were consistent with the move to a comprehensive adjudicator approach, which occurred in the Business Units. The change also facilitated the realignment of appeal teams by industry sector, consistent with the WSIB's service delivery model. The creation of a larger single stream permitted greater industry specialization than was possible under the two smaller streams. In addition, a one-stream system simplified the appeal rules, making the system easier for the workplace parties to understand and to participate in.

II. KEY FEATURES

The key features of the integrated appeal system are as follows:

1. BETTER COMMUNICATION

- To reduce the number of cases where an objection is required, early dialogue occurs between the party and the frontline decision-maker to ensure that misunderstandings do not occur and that the reasons for a decision are clearly and carefully explained.

2. TIME LIMITS

- To comply with new statutory requirements, the objecting party must confirm in writing, within specific time periods, an intention to appeal.

3. SELF RELIANCE

- To ensure the dissatisfied party is fully aware of the information upon which the decision was based, access to the claim or firm file is provided. At the same time, the party is sent an Objection Form.

- To help focus the nature of the objection and to assist the WSIB to reach an early resolution, the party objecting to a decision must complete and return the Objection Form.

4. RECONSIDERATION

- To ensure that every opportunity is given for early resolution, the decision-maker reconsiders the original decision based on the information in the file and the Objection Form and any enquiries made based on information identified in the Objection Form.

5. ALTERNATIVE DISPUTE RESOLUTION

- To recognize the diversity of issues appealed, a variety of dispute resolution approaches are made available by the Appeals Branch (AB). The approach chosen is geared to the nature of the issues under objection. Approaches range from informal to more formal and from expedited to more time-consuming, depending upon the complexity of the issues to be resolved.

III. EARLY RESOLUTION PROCESS

THE HANDLING OF DISPUTES BY THE BUSINESS UNITS

1. DIALOGUE / DECISION STAGE

- Before issuing a written decision, the decision-maker will ensure that: there are no other issues that need to be addressed; all necessary information has been obtained; and the position of the parties has been clarified. All issues should be dealt with, to the extent possible, in a single decision letter.

- When a decision is made, the decision-maker will invite the adversely affected party to contact the decision-maker to discuss any concerns the party may have with the decision. The decision letter will also advise the party of the time limits for appealing the decision.

  Please see APPENDIX "A" for rules about time limits.

- If concerns are raised about the decision, the decision-maker will review the concerns with the party and explain the rationale for the decision and address any new information which may be provided.

- If the decision is not changed and the party has indicated in writing a desire to appeal the decision (Notice of Objection), the decision-maker will refer the file to the access area.

2. ACCESS / OBJECTION FORM STAGE

- The access area will provide the party/representative with access to the claim file (in accordance with established WSIB policy) along with an instruction sheet and an Objection Form. An appeal will not proceed until all access issues have been resolved either through consent or by order of WSIB or by WSIAT(on appeal).

- In the case of revenue objections, access to the firm file is not provided automatically, but the employer/representative is given the opportunity to obtain access if they choose. The contents of a firm file are comprised primarily of correspondence between the WSIB and the employer, which makes the need for access to that information less likely.

- The party/representative is required to complete a WSIB issued Objection Form and return it to the decision-maker if they choose to proceed with an objection

- The completed Objection Form will contain reasons why the decision is felt to be incorrect; any new information not considered by the decision-maker; and a summary of the further benefits or services which are requested.

- The access area will also send a letter to the non-objecting party/representative along with a Participant Form to be completed and returned if the party wishes to participate in the event the case proceeds to the AB.

3. RECONSIDERATION STAGE

- If the objecting party returns a completed Objection Form, the decision-maker will review the form for completeness and any new information which is provided. Where appropriate, the decision-maker will reconsider the original decision. Where new issues are raised in the Objection Form, the decision-maker will address those issues as well, including obtaining additional information where required.

- If the decision is not changed and all outstanding issues have been addressed, the decision-maker will refer the file to the AB.

- The Manager in the Business Unit may review the file to confirm that all presenting issues have been ruled on before the file is sent to the AB.

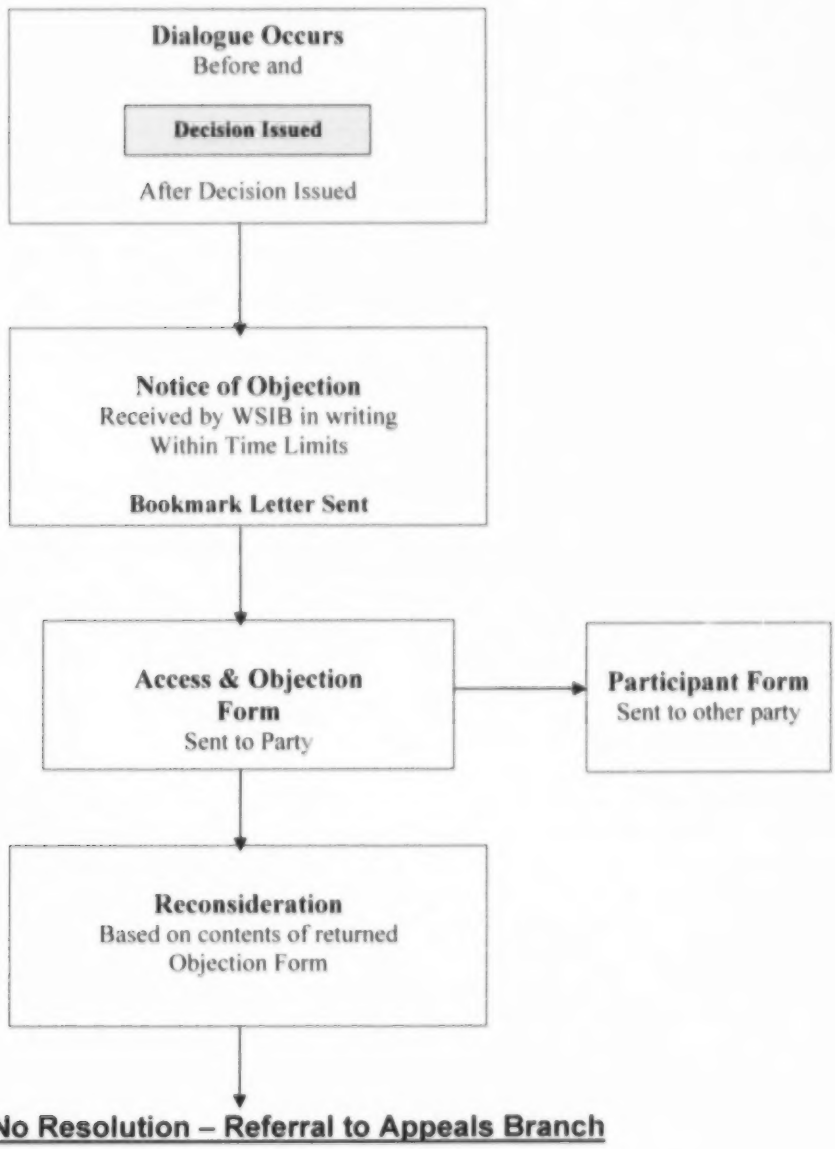
4. REFERRAL STAGE

- A dual referral is made through the completion of an Appeals Referral Memo. The file is simultaneously referred to the access area and to the AB (Desk: **T8000**). The access area will provide access updates to the objecting party/representative and will also provide access to the non-objecting party/representative where they have indicated an intention to participate in the appeal. This "secondary" access function ensures that when the parties/representatives are contacted by the ARO, they will be in a position to discuss the objection in an informed manner.

EARLY RESOLUTION PROCESS

THE HANDLING OF DISPUTES BY THE BUSINESS UNIT

OVERVIEW



Where No Resolution – Referral to Appeals Branch

IV. APPEAL PROCESS

THE HANDLING OF APPEALS IN THE APPEALS BRANCH

A. OVERVIEW OF RESOLUTION METHODS & PROCESS

- All cases entering the AB are dealt with by Appeals Resolution Officers (AROs). Outcomes are reached using a variety of methods determined by the nature of the issue under appeal. The following is a summary of the methods used.

1. 60-DAY DECISION OPTION

- The 60-day decision option is intended to be utilized for more straightforward cases. Upon entering the AB, the objecting party/representative is given the opportunity to choose the 60-day decision option.

- Where this option is chosen, a decision is made within 60 days based on information contained in the claim file and any additional information submitted by the parties in writing. This approach provides all objecting parties with the opportunity to choose an expedited process of review and places the onus on the objecting party/ representative to gather any new information to be relied upon.

2. REVIEW / ENQUIRY / HEARING OPTIONS

- The review/enquiry/hearing options represent the most common approaches to resolving objections.

- In cases where a 60-day decision option is not chosen, the case is assigned to an ARO who contacts the parties, confirms the issues and determines the most appropriate method of resolving the objection. If it is agreed at this point that the case can be resolved on the basis of submissions alone, the parties are ordinarily given 21 days to make submissions. Once submissions are received, the case goes to the Resolution Stage for a final outcome.

- If one or both parties wish to submit further evidence, the case goes from the Review Stage to the Enquiry Stage. Once the additional evidence and submissions are received, the case goes to the Resolution Stage for a final outcome.

- A case which is more complicated and requires an in-person hearing, goes from the Review Stage to the Scheduling and Hearing Stages before a resolution can be reached.

3. SPECIAL ADR PROJECTS

- Special Alternative Dispute Resolution (ADR) projects are offered by the AB. Appeal cases arising from larger employers are sometimes dealt with through special projects which are aimed at reaching outcomes more efficiently and more consensually. These projects depend upon the willingness of the employer and the union to seek constructive ways to resolve appeals.

- Each project is developed in consultation with the employer and union and procedures vary based on the needs of the parties.

- The ADR project between Stelco and the United Steelworkers of America (Local 1005), for example, involves a dedicated ARO who provides a written "view" or opinion of the case to the employer and union representatives. A meeting is held where as many as 15 cases are considered. The discussions centre around the "view" and most cases are resolved through an agreed upon outcome. A small number of cases actually proceed to a hearing following one of these sessions. In some cases, additional enquiries may be identified as necessary before a resolution can be reached.

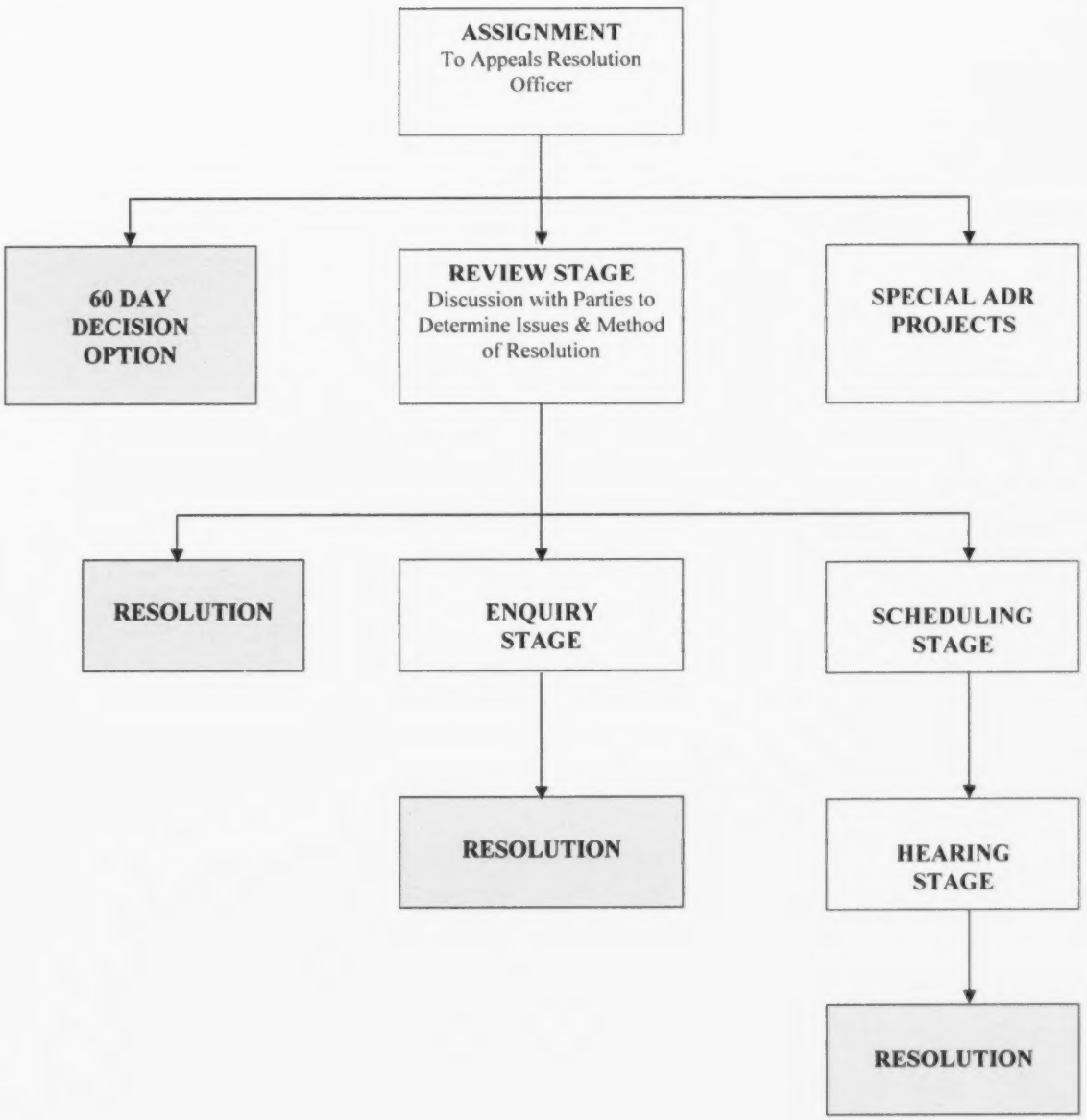
- Projects of this kind have been used most often in the steel industry but have also worked effectively in the mining, automobile and retail food industries.

- More information about the opportunity to develop employer-specific ADR projects should be raised with the Director of the AB.

APPEALS BRANCH

THE HANDLING OF APPEALS BY THE APPEALS BRANCH

OVERVIEW



B. ROLE OF THE APPEALS RESOLUTION OFFICER

- AROs are responsible for achieving resolutions to objections. In discharging their responsibilities, AROs shall comply with the following code of conduct:

  1. To act in a fair and impartial manner and avoid any conflicts of interest.

  2. To be diligent and conscientious in the performance of their duties.

  3. To treat all parties and participants in the appeal process with courtesy, dignity and respect.

  4. To approach every objection with an open mind, capable of fairly assessing and weighing evidence and to avoid doing or saying anything that would cause a well informed, reasonable party to think otherwise.

  5. To conduct such enquiries as may be necessary to properly resolve an objection in recognition of the non-adversarial nature of the WSIB's system of adjudication and to ensure appropriate protection for unrepresented parties.

  6. To reach conclusions based on objective and independent assessments of fact, in accordance with the Act and WSIB policy.

C. APPEAL STAGES

1. ASSIGNMENT STAGE

- Upon entering the AB, a file will be assigned to the appropriate *Appeals Team based on geographical location and industry sector/small business allocation.* Cases are assigned to individual AROs on a monthly basis in the order received in the branch.

- The assignment *by geographical location and* industry sector/small business unit is consistent with the alignment of the Business Units and is aimed at developing greater knowledge of and familiarity with specific industries and their associated occupations and work processes, thereby maximizing the quality of resolutions.

- For all objections entering the AB, the objecting party/representative will be forwarded a 60-day decision option form. If the form is completed and returned, an ARO will be assigned promptly and a decision will be reached within 60 days of the completed option form being received.

  Guidelines for 60-day decision option cases are contained in the attached APPENDIX "B".

- Files which have been allocated to teams but are not yet allocated to AROs are the responsibility of the Appeals Manager and the team support staff, who will respond to questions about status and will deal with requests for priority service.

2. REVIEW STAGE

(a) Participants

- The objecting party is a participant in the proceeding. The non-objecting party is also a participant where they have completed the appropriate Participant Form.

- Where the non-objecting party has chosen not to participate, there is no obligation to include that party in any of the proceedings; however, the party will be sent a copy of any decision or agreement which is reached at the conclusion of the proceeding.

- Where a party does not initially complete a Participant Form but subsequently advises the WSIB of an intention to participate in the appeal process, they will be included in all discussions and communications which occur.
  (In this situation, the party should advise the AB of their intention by telephone and forward a completed Participant Form directly to the AB to ensure the ARO is aware of their participation.)

- Third parties may be included in certain circumstances. Where, for example, it is alleged that a successor company may bear responsibility for the costs of a claim or for a re-employment obligation arising from the accident, that company will be given notice of the proceeding and a full opportunity to participate.

- When an employer is no longer in business and their account has been closed, they will generally not be included as a participant in the appeal proceeding. AROs may still request information from the former officers or employees of the company where such information is necessary to determine the merits of the appeal.

(b) Representatives

- All parties have a right to be represented by a representative of their choice.

- The AB recognizes and enforces the Code of Conduct established by the WSIB for representatives.

(c) Appeals Resolution Officer Contact

- The ARO reviews the file to determine the facts, the nature of the issues under objection and the identity of the participating parties.

- The ARO contacts the participating parties/representatives in order to explain the objection process and the role of the ARO. This contact normally occurs by telephone.

- Discussions occur at this stage to identify the issues under objection, the appropriate method of resolution and possible enquiries which may be needed.

- An opportunity may arise during the initial contacts for an agreement to be reached on the outcome. The participants may come to a common understanding of how the facts of the case match relevant law/policy. Under these circumstances, an agreement to allow or allow in part some or all of the presenting issues may result. Any agreement reached will be issued in writing using the approved format.

- Where an agreement on an outcome does not occur but it is agreed that no additional information is required and the ARO may proceed with a decision, the case proceeds to the Resolution Stage.

(d) Setting the Issue Agenda

- One of the key features of the appeal system is a comprehensive review of the file by both the Business Unit and the AB. Before qualifying for consideration by the AB, the objecting party will have first completed an Objection Form which identifies all issues in dispute and ensures that all presenting issues are addressed in the Business Unit.

- Additional issues may still present themselves at the appeal stage. Where additional issues do present themselves but have not been ruled on by the Business Unit, they will be added to the issue agenda for resolution by the ARO, where:

  - the participating parties agree to have the issues added
  - information necessary to resolve the issues is available to the ARO without extensive additional enquiry and
  - the issue is not excluded from review by the statutory time limit for appeal.

- Situations may occur where, regardless of whether the issue has been raised by either party, the issue is determined by the ARO as necessary to deal with in order to give proper effect to the real merits and justice of the case. The ARO has the authority to add such an issue to the issue agenda but must notify the parties/representatives.

- There may be cases in which the ARO identifies a downside risk. In such circumstances, the ARO must advise the party/representative of the downside risk.

- In all cases, the benefits which flow from a decision will be considered part of the issue agenda and the ARO will be responsible for ruling on benefits to the extent that reliable information is either contained in the file or readily available to the ARO on this issue. Therefore, where the ARO accepts entitlement for impairment or for a period of disability, the ARO will also resolve the nature, level and duration of benefits to the extent that available information permits.

- *In considering requests for retroactive experience rating adjustments based Second Injury and Enhancement Fund (SIEF) relief granted past the applicable experience rating window, the ARO will have regard for exceptional circumstances that may exist in accordance with the guidelines set out in – APPENDIX "F".*

- In cases where the time limit has expired for any issue which the party wishes to have resolved, and the issue of an extension has not previously been addressed, the ARO will deal with that issue as a preliminary matter and make a ruling in writing within 30 days of receiving submissions from the parties.

Please see appeal time limit extension criteria set out on page ii of APPENDIX "A"

(e) Requests for Representation

- In cases where either party requests that the ARO delay the proceedings in order for a representative to be arranged, a delay of up to 21 days will be granted.

- In the case of a request by the objecting party, if no representative has been arranged within 21 days, the party will be given the option of proceeding without a representative or having the objection treated as withdrawn. Where the case is withdrawn, it can re-enter the appeal system as a new appeal at a later date but will not be given priority status and will be assigned to the same ARO.

- In the case of a non-objecting party who has been unable to arrange for a representative within 21 days, the ARO will proceed with the case. The non-objecting party will be free to continue efforts to arrange for a representative as the case proceeds.

(f) Outcomes

(i) Proceed to Resolution Stage

- Where the ARO and the parties/representatives are satisfied that additional enquiries are not necessary, and a consensual agreement cannot be reached, final submissions will be requested and the case will move directly to the Resolution Stage.

(ii) Proceed to Enquiry Stage

- If it is determined that additional information is required, which can be obtained through non-hearing enquiries, the case will proceed to the Enquiry Stage.

(iii) Proceed to Scheduling Stage

- If it is determined that an in-person hearing is required, the ARO will discuss with the parties the appropriate location for the hearing, any witnesses that may be required and any additional information that should be obtained prior to the hearing.

(iv) Returns

- Where a file is returned to the Business Unit for further action without a resolution being reached, significant delays occur in the process, causing much distress to the parties. The appeal system is designed to reduce instances where "returns" occur.

- A return will not be made without a discussion first occurring with the parties. Where a return does occur, the ARO will complete a memo outlining the reasons for the return. The "return" memo will be sent to the Business Unit and a copy will also be sent to the parties/representatives and to the appropriate Appeals Manager.

- Returns will generally only occur for the following reasons:

  - another claim (prior or subsequent injury) is identified which would likely impact on the issue in dispute and that claim was not reviewed by the Business Unit prior to reaching its decision. This is to be distinguished from situations where prior or subsequent relevant claims were reviewed but simply not referred with the file under objection. In those cases, the ARO will arrange to have any additional relevant files obtained without the necessity of the case being returned to the Business Unit;

- a relevant entitlement issue has not been ruled on by the Business Unit and the ARO is unable to add it to the issue agenda (see "Setting the Issue Agenda" on Page 11);

- there is a significant deficit in the information used by the Business Unit decision-maker to decide the issue(s) under objection;

- the Business Unit decision is based in whole or in part on surveillance evidence but the subject of the surveillance has not been adequately verified. (Where the identity is contested, a detailed investigation by the Special Investigations Branch should be undertaken before the matter is referred to the AB.)

- Where the action required to be taken by the Business Unit is completed but one or more issues remain in dispute, the file will be sent back to the AB and assigned to the same ARO on a priority basis without the requirement that the party complete another objection form.

(v) Withdrawals

- Where the objecting party/representative indicates to the ARO that they do not wish to proceed or are not ready to proceed with the objection, a letter will be sent to the parties confirming this and the objection will be treated as withdrawn.

- In cases where the objecting party/representative does not return telephone messages or correspondence from the ARO, a letter will be sent advising that if no reply is received within two weeks, the objection will be treated as withdrawn.

- Where a case is treated as withdrawn, it can re-enter the AB at a later date. If the case does re-enter the AB, it will not be given priority status but the same ARO will be assigned to the case once it reaches the top of the assignment queue.

3. ENQUIRY STAGE

(a) Choosing the Method of Enquiry

- It is recognized that a variety of methods are available to obtain information including:
  - telephone / teleconferencing
  - letter / fax
  - informal meetings

- investigations conducted by WSIB staff
- assessments, tests and opinions obtained from internal and external health care, ergonomic and industrial hygiene specialist

- It is the ARO's responsibility to determine what information is needed to resolve the case and to choose the most efficient and timely method of obtaining that information. Generally, the best way to obtain information is through the parties themselves. For example, where copies of medical records or reports are required, the worker or worker's representative is likely able to obtain the documentation more efficiently than the WSIB.

(b) Documenting Information Received

- Most information received at the Enquiry Stage will be in written form, including reports, records, letters and WSIB memos; however, other information will be received orally, either over the telephone or through informal meetings. Information received orally must be appropriately documented.

(c) Keeping the Process Moving & the Parties Informed

- The ARO is responsible to follow-up on outstanding enquiries in order to ensure that information requests are responded to in a timely manner. It is also the responsibility of the ARO to keep the participating parties advised of the status of all enquiries being conducted.

(d) Post-Enquiry Access & Submissions

- New information that is received during the enquiry stage will be shared with the participating parties. Consent of the worker will be required before releasing medical reports/records to the employer.

- Parties will generally be given 21 days to provide post-enquiry submissions to the ARO. Shorter or longer periods may be given depending upon the complexity of the case and the circumstances of the parties/representatives.

- It is open to the ARO to arrange a conference call/video conference call with the parties to receive final submissions if it is more expedient to do so.

(e) Outcomes

- Once all enquiries are completed and submissions received, the case will proceed to the Resolution Stage.

- There may be exceptional cases where the enquiries lead the ARO to proceed to an in-person hearing. This will be appropriate where significant credibility issues become apparent or where complex issues of fact arise as a result of the enquiries. In such cases, the ARO will refer the file to the Scheduling Stage.

- Withdrawals and Returns may also occur following the Enquiry Stage and the same principles and procedures apply at this stage as apply in the Review Stage described earlier.

4. HEARING STAGE

(a) Determining When a Hearing is Appropriate

- A fundamental objective of the appeal system is to provide every opportunity to resolve cases without a formal hearing. In-person hearings can contribute significantly to delays and to an adversarial relationship developing between the workplace parties.

- It is anticipated that most cases will be resolved without the need for an in-person hearing. Hearings will generally be required where:

  - the issue under objection involves a complex factual question which can only be properly assessed through a hearing (examples: occupational exposure, disablement and job suitability issues);

or

  - the decision under objection turns on an issue of credibility which can only be properly examined through cross-questioning at a hearing (example: issues relating to proof of accident or compliance with re-employment obligation)

(b) Scheduling

- Once it is determined that an in-person hearing is required, the ARO will refer the file to a scheduler who will proceed to arrange for a mutually convenient hearing date.

- Once a date has been arranged, the scheduler will issue and send a notice of hearing to the parties setting out the date, time and place for the hearing. Generally, hearings will be held in the city where the Board's file is administered or the city closest to that location as corresponds with the usual hearing locations. Exceptions are dealt with on the basis of improved customer service and must be fiscally responsible.

- Where the non-objecting party indicates that they are not ready to set a

hearing date or are not prepared to provide available dates consistent with usual scheduling time frames, the scheduler will set the date on the basis of the availability of the objecting party. If the objecting party refuses to cooperate in the scheduling of a hearing date, the case will be treated as withdrawn.

(c) Ensuring Hearing Readiness

- The Appeals Administrator (AA) is responsible for taking appropriate steps to ensure that all necessary documents and witnesses will be available at the hearing and for dealing with any procedural issues that may arise prior to the hearing.
- The AA will also receive and consider written requests by the parties for the production of additional information/documentation for the hearing. When considering whether or not to obtain information requested by the parties, the AA must determine whether the information is relevant and necessary in consideration of the issues under objection.

  In determining whether or not to issue a subpoena, the criteria set out in APPENDIX "C" will apply.
- All documentary evidence submitted by the parties prior to the hearing should be received by the WSIB at least 14 days prior to the hearing.
- Where documentary evidence is submitted prior to the hearing, and the other party has not been copied, the AA is responsible for ensuring that access to these documents is provided to the other party.

(d) Postponements

- The AA will deal with all pre-hearing requests for postponements. The AA has the authority to grant a postponement request where it meets one of the following criteria:
  - sudden illness of the worker;
  - sudden illness of the worker's representative where no replacement is readily available;
  - sudden illness of the employer in the case of a small business operation where the employer is to act as the representative;
  - sudden illness of the employer's representative if no replacement is reasonably available;
  - death of one of the parties or a member of his/her immediate family;
  - adverse weather conditions on the day of the hearing or an accident while on route to the hearing.
- Where a postponement request is granted, the AA will notify all parties and will return the file to the scheduler to arrange for another hearing date.

(e) Procedures for In-Person Hearings

i. Guidelines

Set out in APPENDIX "D" are procedural guidelines for the conduct of in-person hearings.

- It is important to note that the circumstances of each case will determine the extent to which all procedures will be followed.

ii. Receiving Evidence

- Rules of evidence which apply in court proceedings do not apply at WSIB hearings.
- Evidence will be received by the ARO if it is relevant to the issues under objection and there is no statutory exclusion or privilege which applies to the evidence.
- It will be up to the ARO to determine how reliable the evidence is and what weight it will be given.

iii. Post-Hearing Information

- In exceptional cases, additional information will have to be obtained following the hearing.
- Post-hearing enquiries should be conducted using the same methods, procedures and guidelines as apply at the Enquiry Stage.
- Access to new information obtained through post-hearing enquiries will be provided to the parties and final written submissions invited.

iv. Withdrawals and Returns

- Withdrawals and returns may also occur at the Hearing Stage and the same principles and procedures apply as were described for earlier appeal stages.

5. RESOLUTION STAGE

(a) Decisions

- Decisions will be written in a clear and concise manner using plain language.
- Where findings are made on the basis of credibility, reasons must be given for accepting or rejecting the credibility of an individual.
- Written decisions should follow formats appropriate to the case. In all cases, the decision must set out: the issues under objection; the applicable policy reference; a brief description of how the issues arose; the evidence considered and how it was weighed; and the conclusion reached.
- Once the decision has been signed, a copy will be sent to the parties and to the appropriate Business Unit.
- In the covering letter sent with the decision, the parties will be advised of the relevant time limit for appeals to the Workplace Safety and Insurance Appeals Tribunal (WSIAT).

(b) Agreements

- Agreements are reached when the participating parties and the ARO agree on an outcome.
- The parties will be advised at the time of the resolution that the agreement constitutes a final decision of the WSIB.
- A document confirming the agreement will be prepared by the ARO. It will cover the same information as a decision (see bullet #3 under "Decisions" above) in order to show how the agreement is consistent with the Act and WSIB policy
- In the covering letter sent with the confirming document, the parties will be advised of the relevant time limit for appeals to the WSIAT

APPENDIX "A"

GUIDELINES FOR DEALING WITH APPEAL TIME LIMITS

1. OVERVIEW OF TIME LIMITS

- A 30-day time limit on appealing a WSIB decision about Return to Work or a Labour Market Re-entry plan made on or after January 1, 1998.
- A six-month time limit on appealing any other WSIB decision made on or after January 1, 1998.
- A six-month time limit starting from January 1, 1998 will apply on appealing any *other* WSIB decision made prior to January 1, 1998.

2. NOTICE OF OBJECTION

- Where the WSIB issues an unfavourable decision, the adversely affected party will be advised in the decision letter of the applicable time limits for appealing. In order to meet the statutory requirements, the party must indicate in writing, before the expiry of the relevant time limit, a desire to appeal the decision.

3. PROCEEDING WITH THE OBJECTION

- To recognize the desire on the part of some parties simply to protect their rights of appeal, the decision-maker who receives a notice of objection will send a letter to the objecting party acknowledging that the statutory time limit has been met and asking the party to confirm when they wish to proceed.
- If the party does not confirm a desire to proceed immediately, no further action will be taken at that time. If the party confirms a desire to proceed immediately, access and an Objection Form will be sent. Once the completed Objection Form is received, the WSIB will proceed with the appeal in the usual manner.
- These procedures will create a low bar (letter confirming intent to appeal) to meet the time limits and a higher bar (completed Objection Form) to have the appeal proceed.

4. RECONSIDERING DECISIONS AFTER EXPIRY OF TIME LIMITS

- The WSIB has the authority under Bill 99 to reconsider any decision "at any time as it considers it advisable to do so". This contemplates decisions being changed by the WSIB through reconsideration after the expiry of the statutory appeal period.
- Circumstances where the WSIB will exercise its authority to reconsider decisions outside of the appeal period include: where a technical error has been made (for example - an incorrect date has been used, incorrect earnings information was applied or an incorrect

or out of date policy has been used); where new evidence is submitted, which is substantial in nature (for example – results of new medical testing, breakthroughs in medical science, or other information coming to light which was not reasonably available within the appeal period).

5. **AUTHORITY TO GRANT EXTENSIONS**

- If reconsideration is not possible and the case has been brought forward for review after the expiry of the statutory time limit, the WSIB has the authority to extend the time limit in appropriate cases.

- Requests for extensions will be considered by the adjudicator who will notify the party in writing of the outcome of the review and the right to object if the extension is denied.

6. **CRITERIA TO BE APPLIED IN DETERMINING TIME LIMIT EXTENSIONS**

- The length of the delay. Broad discretion to extend will be applied where appeals are brought within one year of the date of the decision. Additional criteria to be considered for longer delays include:

  - Serious health problems (experienced by the party or the party's immediate family) or the party leaving the province/country due to the ill health or death of a family member;

  - Whether there was actual notice of the time limit. This acknowledges that post '98 decisions specifically refer to the time limits but pre '98 decisions do not;

  - Whether there are other issues in the appeal which were appealed within the time limits and which are closely related to the issues not appealed within the time limits;

  - The significance of the issue in dispute;

  - Whether the party was able to understand the time limit requirements.

- All decisions to extend time limits will be based on the merits and justice of the case.

7. **APPEALING TIME LIMIT RULINGS**

- If the party indicates a desire to appeal the time limit ruling, the matter will be referred by the manager in the operating area directly to a manager in the Appeals Branch for assignment to an Appeals Resolution Officer. The ARO will rule on the time limit issue within 30 days of receiving submissions from the parties.

  If the extension is granted, the claim will be returned and the usual Access/Objection Form process will be initiated (see page 3 of Practice & Procedures paper).

APPENDIX "B"

GUIDELINES FOR 60 DAY DECISION CASES

1. **GENERAL**

- When a case is received in the AB, an option letter is sent to the objecting party/representative providing the option of an expedited decision.
- These are intended to be non-enquiry decisions made on the basis of information in the claim file and information submitted by the parties.
- The expedited decision process is activated when the signed option form is received by the AB.

2. **PROCEDURES**

a) In All Cases

- If the case is not allowable based on the contents of the claim file and any additional information submitted with the Option Form, a decision will be issued.
- If the case is allowable and no Participant Form has been received or the outcome has no consequences to the non-objecting party (i.e. some employer SIEF objections), a decision will be issued.

b) In Cases Where Participant Form Received

- If the case appears to be allowable, the non-objecting party will be contacted to determine if they have additional information to submit. If they do not, a decision will be issued. If they do have information to submit, the ARO will give the party/representative 21 days to provide the information. If this information may reasonably cause the ARO to deny the appeal, the objecting party/representative will be given an opportunity to reply.

3. **ISSUE AGENDA**

- Issues not ruled on by the Business Unit will not be added to the issue agenda where the 60-day decision option is chosen.
- If additional issues are raised, they will be referred back to the Business Unit to rule on after the 60-day decision has been issued.

APPENDIX "C"

GUIDELINES FOR ISSUING SUBPOENAS

A. CRITERIA

1. In determining whether a subpoena is essential and should be issued, the following facts should be considered:

   a) whether the evidence is relevant to the issue in dispute;

   b) whether the evidence is likely to be significant to a determination of the issue in dispute;

   c) whether the request to subpoena a witness will be used for the bona fide purpose of giving evidence before the proceeding or whether it will likely be used to harass or inconvenience the witness;

   d) whether the oral or written evidence can be obtained in a more reasonable manner. For example in situations involving physicians or LMR Service Providers it is generally more appropriate to obtain necessary information or clarification through written questions.

   e) whether the subpoena request is being used for the purpose of "fishing" in the hopes of obtaining relevant information;

   f) whether the person receiving the subpoena has access or control of information/documents, relevant to the case. The subpoena should be issued against the person with custody of the necessary documents;

   g) whether the prospective witness is compellable in the proceedings (WSIB policy has established that WSIB employees are not compellable witnesses and other statutes limit the compellability of certain witnesses).

2. In difficult cases, advice and direction in deciding if a subpoena should be issued may be sought from the Director of the Branch.

B. PROCEDURES

1. A request to subpoena documents or a witness must be made in writing. In the case of documents, the request must identify the document and indicate whose control it is in. The request should also state the relevance and likely significance of the document. The request in relation to a witness must indicate the name and address of the proposed witness and an indication as to the nature, likely significance and relevance of the evidence to be given by the witness.

2. The AA will provide the secretary with all necessary information in a memo. This information will include the name and address of the witness and the particulars of any documents which the witness must produce.

3. The Business Clerk will:

   a) type the subpoena;

   b) refer the document to the Branch Director for signing;

   c) take the signed subpoena to Corporate Records to have it sealed with the WSIB's corporate seal;

   d) prepare a memo and arrange delivery of the memo, the original subpoena and a copy of the original subpoena to the process server provider (PSP).

4. The PSP will arrange for the subpoena to be served and provide the WSIB with an Affidavit of Service, which will be duly witnessed by a Commissioner.

5. Where the ARO concludes that the document or the proposed witness is not essential to a determination of the issue in dispute, the AA will communicate this to the parties in writing. This communication should also advise the party to raise the matter with the ARO at the hearing, in the event that the decision not to grant a subpoena is disputed.

6. At the hearing, should the subpoenaed document or witness not be produced or attend, as the case may be, or where the AA has refused to issue a subpoena, the ARO may:

   a) proceed without the evidence or the witness if it is determined that the evidence in question is not essential to a disposition of the issue in dispute;

   b) proceed with the hearing, indicating that a decision on the need for the production of evidence or attendance of a witness will be reserved until the conclusion of the hearing. Where, at the conclusion of a hearing, it is determined that the evidence in question is essential, the ARO will direct that the hearing be re-convened and that appropriate subpoenas be issued;

   c) decide at the outset that the subpoena should be issued and postpone the hearing for that purpose. This course of action should only be taken (over b) above) where the evidence in question is so critical as to make proceeding to hear the available evidence unreasonable.

7. If the subpoenaed witness does not attend and the ARO is satisfied the evidence to be given is essential, then the ARO may decide to re-issue the subpoena with instructions to the PSP to communicate to the witness the necessity of attending a future hearing, or the ARO may recommend that the WSIB proceed with contempt proceedings against the witness. Such a decision shall be made in consultation with the Branch Director and the WSIB's General Counsel.

APPENDIX "D"

GUIDELINES FOR CONDUCTING IN-PERSON HEARINGS

HEARING PROCEDURES

a) Purpose

- The purpose of a hearing is to gather information in a thorough, fair and courteous manner. In doing so, every effort should be made to create and maintain a non-adversarial atmosphere.

b) Prior To Entering The Hearing Room

Prior to entering the hearing room, the ARO shall:

i) make appropriate introductions;

ii) determine the presence of and identify all individuals who will be participating in the hearing and ascertain their roles;

iii) explain that witnesses will be excluded from the hearing room until they are required to give testimony. This does not apply to the worker or an individual designated by the employer as its resource person. These individuals are allowed to remain in the hearing room throughout the proceedings;

iv) decide whether or not observers will be permitted to be present at the hearing. As a general rule, WSIB hearings are held "in camera", which means they are not open to the public. However, the WSIB routinely permits observers to attend where both parties consent. These observers are almost always related to the parties in some way (i.e. relative, friend);

v) generally, unless there are compelling reasons for excluding observers (i.e. sensitive factual issues, matters of space, potential security problems), observers will be allowed to sit in. The ARO must make it clear to an observer that they are not entitled to participate in the hearing.

c) In the Hearing Room-Prior to Going on the Record

Before going on the record, the ARO shall:

i) arrange for appropriate seating of the parties and observers;

ii) outline the purpose of the hearing and how it will proceed (i.e. the order of presentations);

iii) discuss with the parties the issues to be dealt with and advise the parties of information or facts which are already established from the evidence and of the specific areas of enquiry which will be necessary in order to deal with the issues under objection;

iv) clarify with both parties what witnesses will be called and what the nature of their testimony will be. The ARO should not hear from witnesses whose evidence is irrelevant to the issue under objection or relates to non-contentious matters of fact already accepted by the ARO. If multiple witnesses are being called to provide the same information, the ARO should seek agreement from the parties with respect to those facts;

v) explain that the information received from the witnesses will be given under oath or affirmed as the witnesses prefer;

vi) indicate that a recording device will be recording everything that is said during the course of the hearing;

vii) if an interpreter is present, explain that the interpreter is not an employee of the WSIB and explain how the interpreter will be used;

viii) explain that a request for a postponement may be dealt with at this stage or as a preliminary matter on the record. The criteria for granting postponements is set out later in these guidelines;

ix) if the objecting party does not wish to proceed with the objection then the matter will be treated as withdrawn the principles and procedures outlined earlier in this document will apply;

x) if a question arises as to whether or not the matter should be returned to the operating area, the principles and procedures outlined earlier in this document will apply.

xi) if both parties request the ARO engage in mediation discussions, the ARO must first secure consent concerning decision–making. If the parties will not allow the ARO to render the decision, before beginning any facilitation, the ARO must explain to the appellant the delay if a consensual outcome is not reached.

d) The Hearing

OPENING THE HEARING-PRELIMINARY MATTERS

The hearing shall proceed in the following manner:

i) the ARO shall state for the record the name, claim number, date of decision being objected to and whose objection it is;

ii) the ARO will indicate for the record who is in attendance at the hearing and what their capacity is;

iii) the ARO will identify the issues under objection;

iv) the ARO will determine if either party has any additional written documents to submit. Where they do, and that material is relevant, it will be received and marked as an exhibit. Exhibits are to be numbered and each will bear the worker's name, claim number, date received and the initials of the ARO;

v) written documents received at this time will obviously not meet the 14-day disclosure requirement of the Branch; however, it is inappropriate not to receive the information considering the statutory requirement to determine cases on their real merits and justice. The ARO will have to determine appropriate procedures for ensuring fairness to the receiving party. This may include delaying the start of the hearing to give the representative an opportunity to review and discuss the documents with the party and/or witnesses. The ARO may also offer an opportunity to make post-hearing submissions on any of the documents submitted. The ARO may also consider postponing the hearing where the prejudice to the receiving party is so significant that no other procedure can overcome the prejudice;

vi) the parties will be asked if there are any preliminary issues to be raised and the ARO will receive submissions and make rulings with respect to such matters. They may include requests for a postponement. Postponement requests at this stage will be dealt with on the basis of the criteria set out later in these guidelines. The ARO may also reserve ruling on any preliminary issues where a decision does not have to be made in order for the hearing to proceed. A request that a subpoena be issued, for example, may be deferred by the ARO until after all evidence has been heard at which time the necessity of the information in question may be clearer.

PRESENTATIONS

The ARO will receive the presentations of the parties in the following order:

i) each party/representative will be given an opportunity to make a brief opening statement which will be a summary of their respective positions. The objecting party will go first followed by the non-objecting party;

ii) the objecting party will be sworn/affirmed and give evidence through questioning by the party's representative, the opposite representative and then the ARO. Following the ARO's questions, the opposite representative and the party's representative will have an opportunity to ask follow-up questions. The opposite party will ask questions which arise from the questions asked by the ARO while the party's representative will have an opportunity to ask questions arising from the questions of the ARO and the opposite representative;

iii) after the objecting party has testified, the other witnesses for the objecting party will be called, sworn/affirmed and questioned in the same order as above;

iv) the non-objecting party will then be given an opportunity to present information through its witnesses. The non-objecting party/representative will ask questions first, followed by the objecting party/representative followed by the ARO, with follow-up questions after that. It should be noted that for the employer's case, the decision on whether or not to call the resource person first is to be made by the employer's representative, but if that individual is not called first and remains in the hearing room while the other employer witnesses testify, the ARO should advise that in the event that credibility is an issue, the resource person's credibility may be compromised by not giving evidence first;

v) each witness should be sworn/affirmed when they enter the hearing room and before questions are asked;

vi) witnesses are dismissed from the hearing room (except worker and employer) after giving testimony;

vii) in some cases the representative(s) may agree to submit the closing argument in writing. In these situations the written presentation should not introduce new evidence and must be shared with the opposite party. The time frame for the submission is 21 days unless indicated otherwise by the Appeals Resolution Officer.

viii) the ARO must ensure that the questions asked of witnesses are relevant to the issues under objection and will refuse to permit questioning in relation to matters considered to be irrelevant. As well, cross-examination is not permitted although cross-questioning is allowed. The distinction between cross-examination and cross questioning is discussed later in these guidelines;

ix) in appropriate cases, to be determined by the nature of the issue and the relative abilities of the representatives, the ARO may suggest to the parties that, having reviewed the contents of the claim file, the ARO wishes to clarify certain information in order to assist in focusing the enquiry. If parties agree to this approach, the ARO will proceed to question the worker/witnesses first. The parties/representatives will then follow with additional questions as may be necessary. If the parties/representatives object to this approach, the ARO will follow the normal hearing protocol set out above;

x) after all testimony has been received, the ARO will invite closing arguments from each representative/party with the objecting party going first followed by the non-objecting party;

xi) each representative may want to respond to the other representative's closing arguments. This is permissible as long as the representatives do not rehash old ground and limit themselves to responding to the specific areas covered by the other side that were not addressed in their own final arguments.

RECESSES – GOING OFF THE RECORD

- Where the hearing continues for more than 1½ to 2 hours, it will likely be necessary to take a break.

- Where possible, breaks should not occur in the middle of a witness' testimony. Where this is unavoidable, the ARO should advise the witness to refrain from discussing their testimony with anyone at the break.

- Where, for any reason during the hearing, it becomes necessary to go off the record (turn off the recording device), the ARO should state at the outset the reason for going off the record and, when back on the record, disclose the nature of any discussions or activities that occurred off the record.

CLOSING THE HEARING

The ARO will conclude the hearing as follows:

i) explain that all evidence presented at the hearing as well as the information on file will be considered in reaching a decision;

ii) explain that a written decision will be made and sent to all parties and representatives;

iii) ask if there are any questions about the proceedings to date;

iv) if it is clear that additional information will be required before a decision can be made, advise the parties of the steps that will be taken to obtain the information and the likely duration of the delays involved;

v) if additional information will be obtained, indicate that the parties will receive post-hearing access and will be given an opportunity to make a submission before a decision is made;

vi) if any post-hearing inquiries will involve obtaining medical information, confirm with the worker their consent to release this information to the employer. If the consent is not given, the issue will have to be dealt with by the AA pursuant to s.58 of the Act;

vii) thank the parties for their attendance and tell them "the hearing is closed".

e) After the Hearing

Once the hearing has been closed, the ARO will attend to the following:

i) consider requests for the payment of expenses from the worker, the worker's witnesses and any subpoenaed witnesses. Travel, meal and accommodation expenses are paid to workers, their witnesses and subpoenaed witnesses who are required to attend hearings outside their area of residence or employment. Travel expenses are limited to travel within Ontario borders. Allowances are paid at the prevailing rates covered by the WSIB's Travel Expense Policy. Also, lost wages will be paid at a rate authorized by the WSIB;

ii) the expenses shall be recorded on a standard expense form which is to be signed by the party requesting the expenses and the ARO;

iii) professional witnesses will be paid a set fee as prescribed by the WSIB;

iv) for hearings held outside of Toronto, the ARO must complete a payment voucher for the payment of the interpreter's fees. This form is to be signed by the interpreter and the ARO following the hearing;

v) all completed expense forms and payment forms are to be submitted to the appropriate secretary within one week of the date of the hearing.

f) Additional Issues

POSTPONEMENT REQUESTS

- Postponement requests made at the hearing are to be ruled on by the ARO after giving a full opportunity to both parties/representatives to present arguments with respect to the request.

- The reasons for granting or denying requests for postponements must be communicated to the parties orally at the time of the hearing.

- The following criteria will be weighed by the ARO in determining whether to grant a postponement request. It should be noted that the consent of the other party does not, by itself, constitute sufficient reason to grant the postponement request

  - was adequate and sufficient notice of the hearing date provided to the parties seeking the postponement;

  - was the hearing date arranged by mutual consent;

  - are the facts giving rise to the request for the postponement compelling and reasonable;

- to what extent does the need for the postponement arise out of the intentional actions or neglect of the party/representative requesting the postponement;

- what prejudice will result to both parties if the request is either allowed or denied;

- how long has the party requesting the postponement been aware of the facts giving rise to the request and what steps were taken prior to the hearing to remedy the situation and to inform the WSIB;

- can any procedural defects, such as the late receipt of written materials, be remedied through delaying the starting time of the hearing or permitting post-hearing submissions so as to minimize the prejudice of not granting a postponement.

CROSS-QUESTIONING VS. CROSS-EXAMINATION

- It is a long-standing practise of the WSIB not to permit cross-examination at hearings. Cross-examination is an integral part of the adversarial approach relied upon in the court system, but is not consistent with the enquiry-based adjudication approach of the WSIB.

- Rules of procedural fairness and the need to determine the justice and merits of the case require that an opposing party/representative be given an opportunity to question witnesses with adverse interests. The opposing party/representative is limited, however, to questions which seek to clarify information relevant to the case. The process of clarification is done through cross-questioning.

- Cross-examination represents a more adversarial approach to questioning which is reflected in efforts to badger, attack or argue with the witness. This approach may intimidate parties and witnesses from coming forward with information and participating in the proceedings. It also creates an atmosphere which is more formal and more confrontational and can result in a significant disadvantage to individuals who are unrepresented.

DISRUPTIVE BEHAVIOUR

- In cases where one or more of the parties or representatives conduct themselves in a disruptive manner that prevents the reasonable conduct of the hearing, the ARO shall put the individual(s) on notice that their behaviour is unacceptable and advise them of the ARO's authority to exclude them from the hearing room if the behaviour continues. If the behaviour does continue, the ARO has the authority to order the exclusion of the individual.

- Where an exclusion order is made against one of its representatives, and to avoid prejudice to the affected party, the ARO has the authority to adjourn the hearing to a later date. It is for the ARO to determine if this is necessary to permit the party whose representative has been excluded to obtain a new representative.

APPENDIX "E"

GUIDELINES FOR DEALING WITH RECONSIDERATION REQUESTS

Authority

Section 121 of the Workplace Safety and Insurance Act states the WSIB may reconsider any decision made by it and confirm, amend or revoke the decision. WSIB Policy 11-01-14 confirms this authority and gives the decision-maker and the decision-maker's supervisor the right to reconsider.

Principles

An ARO decision is the final decision of the WSIB. In an enquiry based system, the information gathering activities leading up to the final decision engage the workplace parties (WPPs) in the process. This allows every opportunity for the WPPs to provide information and evidence in support of their respective positions.

The reconsideration authority is not intended to be used to simply rehash the arguments of the WPPs or act as another level of appeal and is only applicable in certain circumstances.

Standard of review

The criteria which would cause a decision to be reconsidered are:

- a substantive defect in the decision or the decision-making process which may reasonably affect
- the outcome
- failure to properly apply the Act or approved WSIB policy
- significant new evidence
- a typographical error which impacts the decision

Application Procedure

An application for reconsideration must be submitted in writing. The submission must state the reasons for the request. If the Business Unit Director is submitting the request, the parties must also be advised.

The request will be considered by the ARO. If no grounds are found to warrant reconsideration, the parties will be advised in writing. If grounds appear to exist, the ARO will notify both parties and establish the procedures to be followed in conducting the reconsideration.

Following reconsideration by the ARO, the Manager or Director may also be asked to reconsider the decision. The ARO's Manager, Branch Director and Senior Management in Operations have the authority to reconsider and change a decision on the same grounds as noted above and will follow the same procedures as the AROs for dealing with reconsideration requests. This is not an additional level of appeal and is not intended to be used simply to substitute management's judgement for the judgement of the original decision-maker.

APPENDIX "F"

GUIDELINES FOR RETROACTIVE EXPERIENCE RATING ADJUSTMENTS – EXCEPTIONAL CIRCUMSTANCES

Retroactive experience rating adjustments may be presented as a stand alone issue in appeal after SIEF relief has been decided.

As a result, it is important for decision-makers to have regard for the experience rating window when deciding SIEF cost relief to be applied.

However, there may be circumstances where retroactive adjustments to SIEF relief occur after the closure of the experience rating window.

Circumstances that may constitute "exceptional circumstances" include but are not limited to:

- *whether the employer pursued SIEF cost relief within a reasonable period after the employer knew or ought have known the worker's recovery period was prolonged or enhanced by a pre-existing condition.*
- *Whether there was a delay in identifying a pre-existing condition.*
- *Whether undue delay in the decision-making process caused the decisions to fall outside the experience rating window.*
- *The length of time between the closure of the experience rating window and SIEF decision. It would be expected that discretion be extended in cases where the period is relatively short (i.e. less than six months).*

When an ARO is deciding on the experience rating adjustment as part of a SIEF appeal, the ARO must be aware of the appeal time limit for the experience rating adjustment, if a decision has been made by the operating area relating to that issue.